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AMENDMENT AS TO PARTY PLAINTIFF—MISTAKE IN NAME OF PLAINTIFF.

By statute in some states, and by orders of court in England, a new plaintiff or defendant may be substituted at any stage of the suit or action, where there has been a bona fide mistake in the name of either.[1] This does not mean, however, that an entirely new party may be substituted from that originally intended, but only that the party originally intended may be substituted by another name. An entirely new plaintiff cannot be substituted after it has become manifest that the original plaintiff cannot maintain the action, but the proper practice is to suffer a non-suit before the jury retire, pursuant to Code 1904, § 3387, and renew the suit in the name of the proper plaintiff.[2]

Where the right of action resides in a corporation, its stockholders cannot be substituted as party plaintiff, or vice versa.[3]

The question as to who is an entirely new plaintiff, within the purview of § 3259, 1904 Virginia Code, permitting the writ or declaration to be amended to correct a variance, may arise in a case, where the christian name of the husband has been mistaken for that of the wife, the cause of action being in the wife and not in the husband. If the pleader intended to bring an action in the name of the husband for the benefit of the wife, it cannot be maintained, and must be dismissed.

A suit cannot be maintained in the name of an attorney-in-fact even in a court of equity.[4]

A bill filed by a sole plaintiff having no interest whatever in

1. Davis *v.* The Mayor, 14 N. Y. 527; Duke of Buccleuf, 1 Prob. Div. 201.

2. Norfolk Southern R. Co. *v.* Greenwich Corp., 4 Va. L. Reg. (N. S.) 285, 95 S. E. 389.

3. Norfolk Southern R. Co. *v.* Greenwich Corp., 4 Va. L. Reg. (N. S.) 285, 95 S. E. 389.

4. 1 Chitty Pld., p. 6, note 3; Jones *v.* Hart, 1 H. & M. 471.

the subject matter of the suit, must be dismissed.[5] If the sole plaintiff is struck out, there are no parties and consequently no case.[6]

An amendment of the name of the plaintiff is admissible where it merely cures a mistake in the name of the party prosecuting the suit, but is inadmissible if it introduces a different party.[7] If, however, the pleader intended to bring the action for the wife and in her name, and this unequivocally appears from the pleading, but through inadvertence, the writ is sued out, and the declaration filed, in the christian name of the husband, mistaking it for that of the wife, the declaration may be amended at any time before the jury retire from the bar, by inserting the wife's christian name and striking out the husband's christian name, or by incorporating the wife's christian name with the addition that she is sometimes called and known by the husband's christian name, as this would be but the substitution of a new name, and not a party plaintiff. Where such mistake in the name of the plaintiff occurs, it is not proper to suffer a voluntary non-suit, which puts an end to the action, and may be attended with serious consequences where the statute of limitations might bar a second action for the same cause, but the declaration may be amended and the action continued, if defendant insists thereupon.

In Virginia we have no such thing as a compulsory non-suit; the Court may advise, but cannot compel it.[8] The effect of a non-suit is to put an end to the present action.[9]

If the suit is brought by a party plaintiff who cannot maintain the action, the suit should be dismissed, as nothing can be gained by a non-suit in such a case.

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5. Sillings *v.* Baumgardner, 9 Grat. 275.
6. Rowan *v.* Hutchisson, 27 Ala. 327.
7. Elliott *v.* Clark, 18 N. H. 421; Willink *v.* Renwick, 22 Wend. (N. Y.) 610.
8. Ross *v.* Gill, 1 Wash. 89.
9. Cahoon *v.* McCulloch, 92 Va. 180.